Supreme Court, U. S.
FILED
NOV 11 1976

Supreme Court of the United States

October Term, 1976
No. 76-1012

JACQUELINE CORNELIUS, *et al.*,
Petitioners,
vs.
CITY OF PARMA, OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF RESPONDENTS

Robert R. Soltis
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Counsel for Respondents

Of Counsel:
Andrew Boyko
Solicitor, City of Parma, Ohio

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 861-5647

TABLE OF CONTENTS

Constitutional Provision and Statute Involved 1
Question Presented 2
Statement of the Case 2
Factual Background 3
Proceedings Below 6
Reasons for Denying the Writ 7
Warth Case Is Controlling 7
Trafficante Case Is Inapposite 9
Conclusion 11

TABLE OF AUTHORITIES

Cases

City of Parma, Ohio, et al. v. Jacqueline Cornelius, et al., 422 U.S. 1052 (74-970) (1975) 2
James v. Valtierra, 402 U.S. 137 (1971) 4
Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974), *cert. denied* 419 U.S. 1108 (1975) 6-7, 11
O'Shea v. Littleton, 414 U.S. 488 (1974) 9
Quality Molding Company v. American National Fire Insurance Company, 287 F.2d 313 (7th Cir. 1961), *cert. denied* 368 U.S. 826 (1961) 11
Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) 9
Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 9, 10

United States, ex rel. Texas Portland Cement Company v. D.C. McCord, 233 U.S. 157 (1914) 10
Warth v. Seldin, 422 U.S. 490 (1975) 2, 3, 7, 8, 9, 11

Constitution and Statutes

U.S. Const. Art. III 1, 2, 3
12 U.S.C. §1715 z-1 4
42 U.S.C. §3601 *et seq.* 9
42 U.S.C. §3610 10
42 U.S.C. §3612 .....2, 7, 10
Ohio Rev. Code §731.31 5
U.S. Supreme Court 23(4) 7

Supreme Court of the United States

October Term, 1975
No. 75-1012

JACQUELINE CORNELIUS, *et al.*,
Petitioners,

vs.

CITY OF PARMA, OHIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article III

JUDICIAL DEPARTMENT

* * * * *

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies

to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects. * * *

42 U.S.C. §3612

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. * * *

QUESTION PRESENTED

Whether, upon remand from this Court for further consideration in light of *Warth v. Seldin*, 422 U.S. 490 (1975), the Court of Appeals correctly applied its teachings in ordering that the complaint be dismissed, where the petitioners failed to allege specific injury to themselves and otherwise failed to demonstrate that they had standing to sue, or that there was a justiciable case or controversy under Article III of the Constitution.

STATEMENT OF THE CASE

This is the second time that this litigation is before the Court. On June 30, 1975, the Court granted respondents' petition for a writ of certiorari in Case No. 74-970, styled *City of Parma, Ohio, et al. v. Jacqueline Cornelius,*

et al. That petition sought relief against the Court of Appeals' judgment which had vacated the District Court's judgment dismissing petitioners' amended complaint for lack of a justiciable case or controversy under Article III of the Constitution.

This Court's Order in Case No. 74-970 reported at 422 U.S. 1052 (1975) read: "The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Warth v. Seldin,* 422 U.S. [490] (1975)."

Upon remand, the Court of Appeals obeyed the Order and compared the allegations of petitioners' amended complaint[1] with the discussion of plaintiffs' complaint in *Warth, supra.* The pleadings closely paralleled each other, and so the Court of Appeals correctly ruled that:

> After careful study of the majority and dissenting opinions in *Warth, supra,* and
>
> Believing it to be completely dispositive of the instant litigation;
>
> Said Appeal is now remanded to the District Court with instructions to dismiss the complaint.

Factual Background

On November 2, 1971, general election day, the people of Parma, Ohio, passed two ordinances which had been placed on the ballot by initiative petitions circulated in July, 1971, in accordance with the Constitution and

---

1. Inasmuch as petitioners did not print the text of their amended complaint in the appendix to their petition for a writ of certiorari, respondents respectfully refer the Court to pages A-36 to A-44 of their separately-printed appendix to their petition in the prior case, No. 74-970, for the exact wording thereof. References thereto will be hereinafter designated "Resp. A- ".

statutes of Ohio. One of the ordinances restored the former 35-foot height limitation on all residential buildings. The other ordinance, as the District Court specifically found (Petitioners' Appendix 13a, note 7),[2] was patterned on Article XXXIV of the California Constitution, which had been found constitutional and commendable in *James v. Valtierra*, 402 U.S. 137, 141 (1971).

It gives the right to the people of Parma, by way of referendum, to decide whether or not to accept federal aid for low-rent housing and rent supplements, pursuant to the consent requirements of federal law.

On November 3, 1971, Parma's building commissioner, acting upon the city engineer's memorandum of October 28, 1971, returned the plans and building permit application to Forest City Enterprises, since they still did not conform to Parma's codified ordinances after numerous notices to that effect had been sent to Forest City Enterprises and it had failed to seek a variance or submit plans which did comply.

The proposed Forest City project, Parmatown Woods, was to be a 10-story high-rise apartment building for the elderly, subsidized under Section 236 of the National Housing Act, 12 U.S.C. §1715 z-1. As part of the application process, Forest City filed with the Federal Housing Administration (F.H.A.) an "Affirmative Marketing Plan" (Resp. A-45 to A-47) wherein it advised the government that the expected tenants would be elderly persons from the ethnic groups who predominate in the area.

Parma's population is in large part made up of descendants of immigrants who, being victims of Nativist prejudice and discriminatory laws such as the "National

---

2. References to petitioners' appendix will be hereinafter designated "Pet. App. ".

Origins Quotas" Immigration Acts, clustered in residential neighborhoods of like cultural and religious identity. This ethnic grouping occurred naturally by free choice without any involvement of city officials. Few nonwhite persons chose to live in the Parma area, and so Forest City advised the F.H.A. that it was not expected they would be attracted to the project.

Forest City built the virtually identical subsidized-project, known as Independence Place, a few hundred feet west in the adjacent community of Parma Heights, in conformity with its ordinances, and asked Parma to rezone the abandoned project-site for commercial development.

As foreseen by Forest City in the identical "Affirmative Marketing Plan" filed with the F.H.A., no nonwhites have moved into Independence Place, even though they were actively solicited to become tenants (Resp. A-48 to A-49). None of the plaintiffs filed an application, or even inquired about becoming tenants (*Id.* A-50).

Although the denial of a building permit to Forest City because of its failure to comply with pre-existing ordinances and the passage of the two initiated ordinances were coincidental in point of time, they were causally unrelated, for the initiated ordinances did not take effect until November 22, 1971, five days after the county board of elections certified their passage.[3] Had Forest City resubmitted the application for the permit or requested a variance before said date, the initiated ordinances would not have been in effect and therefore not applicable.[4] Forest City did neither, nor did it appeal the permit denial, nor is it a party to this litigation. As the District Court

---

3. Ohio Revised Code §731.31.

4. The referendum ordinance would not apply to any Section 236 development except insofar as Federal Rent Supplements are involved (Pet. App. 13a).

expressly found, the initiated ordinances are merely "on the books" and have never been applied to any project (Pet. App. 11a).

Proceedings Below

This action was filed by petitioners on April 17, 1973, more than sixteen months after the November incidents described above. It was instigated, filed, and is being maintained by counsel employed by the National Committee Against Discrimination in Housing (NCDH), a Washington-based organization which has maintained and participated in numerous housing suits throughout the country, with assistance from local counsel.

A few minutes after this suit was filed, a similar action was filed in the name of the United States by the Attorney General. It is pending in the District Court and, as this Brief is being written, is awaiting a ruling on Parma's motion for a summary judgment.

Petitioners did not allege that they were eligible for, or could afford to live in, the elderly housing project which was not built in Parma when Forest City failed to comply with Parma's pre-existing ordinances. Neither did they allege that they had ever lived in Parma or sought to live there. In paragraph 22 of their amended complaint (Resp. A-41), petitioners referred to a decision of the District Court which had ruled in another case that the failure of Parma (and four other cities) to sign cooperation agreements for the construction of public housing was prima facie evidence of an intent to exclude blacks. However, the Court of Appeals for the Sixth Circuit reversed that decision and expressly held that the findings of alleged discrimination by the District Court "are not supported by substantial evidence and are clearly erroneous". *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500

F.2d 1087, 1091, footnote 3 (6th Cir. 1974), *cert. denied* 419 U.S. 1108 (1975).

In the course of its comprehensive opinion (Pet. App. 1a to 28a), upon which its judgment of dismissal for lack of a justiciable case or controversy was based, the District Court reaffirmed its prior order holding that the action under 42 U.S.C. §3612 was time-barred (*Id.*, 22a). Only the black plaintiffs, petitioners herein, presented issues for review upon appeal to the Court of Appeals for the Sixth Circuit, but no issue as to the dismissal of their 42 U.S.C. §3612 (Fair Housing Act) claim for being time-barred was presented or briefed by them.

REASONS FOR DENYING THE WRIT

Warth Case Is Controlling

Petitioners raise no issues of substance and demonstrate no special and important reasons warranting review. The Court of Appeals for the Sixth Circuit obeyed the order of remand of this Court and further considered this action in light of *Warth v. Seldin*, 422 U.S. 490 (1975). It correctly found that *Warth* is completely dispositive of this litigation.

Petitioners have failed to present with accuracy, brevity, and clearness whatever point it is they are attempting to make. Under Rule 23(4) of the Rules of this Court, that alone is sufficient reason for denying their petition.

This action closely tracks *Warth*. As did the plaintiffs in *Warth* (422 U.S., at 502), petitioners asserted standing as persons of low or moderate income and as members of a minority racial group. Similarly, petitioners alleged that the enforcement of Parma's ordinances by respondent

officials would have the effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. However, the Parma ordinances in this litigation have, in fact, never been applied to any concrete project and are merely "on the books" (Pet. App. 11a). In short, "the facts alleged fail to support an actionable causal relationship between [Parma's ordinances] and petitioners' asserted injury." *Warth*, at 507.

No excuse is readily apparent for the outright falsehood stated by the NCDH in petitioners' petition on page 16. In their desperate but unsuccessful attempt to distinguish this litigation from *Warth*, they stated that "the plaintiffs in this case allege explicitly that they and members of the class they represent were eligible to reside in the subsidized housing which was blocked by the defendants." There is no such allegation in petitioners' pleading (Resp. A-36 to A-44). The District Court correctly found that no live controversy presently exists regarding this housing. It expressly held that "Indeed, plaintiffs accept this reality, for as shown by their complaint none of them have alleged that they were themselves prospective tenants of the Forest City development. Nor do they seek to represent a class so limited" (Pet. App. 11a). As the uncontroverted affidavits of respondents filed in the District Court attest (Resp. A-45 to A-50), no blacks became tenants in the identical elderly housing project actually built a few hundred feet west of the Parma site, nor did any of the petitioners even make inquiries about becoming tenants.

In the action at bar, the District Court expressly found that the "challenged conduct of Parma in enacting the ordinances has not as yet directly and immediately injured plaintiffs. No actual conflict has yet arisen between the rights of the low and moderate income plain-

tiffs and the actions of the defendants relative to these ordinances. Indicative of the presence of abstract injury only is the fact that if the Court were to entertain this suit and on the merits declare the suspect ordinances invalid, this judicial action would not serve as the catalyst for the construction of the housing undeniably needed by plaintiffs. Public authorities and private sponsors would still be needed to come forward." (Pet. App. 17a).

Warth, at 508, confirmed the correctness of the District Court's reasoning: ". . . a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention. Absent the allegations of a demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied'. *Schlesinger v. Reservists to Stop the War*, 418 U.S., at 221-222."

Moreover, "if none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class" which they purport to represent. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Trafficante Case Is Inapposite

Petitioners' extended discussion of *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), is entirely irrelevant to any issue in this action. Petitioners' amended complaint on its face reveals, as the District Court cogently held (Pet. App. 22a), that any claim under Title VIII of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* was time-barred for not having been filed within

the 180-day limitation imposed by 42 U.S.C. §3612. *Trafficante* dealt only with the standing of white tenants of an apartment complex to bring suit under §810 of the Act, 42 U.S.C. §3610. Petitioners stated, on page 2 of the petition for a writ of certiorari, that the sole question presented for review here is the standing of lower income minority persons. Thus, *Trafficante* is inapposite. The white plaintiffs in this action were properly dropped by the District Court. They failed to present to the Court of Appeals any issue for review of, or to brief, their being dropped. They are not parties here.

Petitioners misstated the holding in *Trafficante*. It did not state that Title VIII in its entirety must be given a "generous construction". That case dealt only with the wording of §810, 42 U.S.C. §3610, which is not the section under which plaintiffs purported to bring this action. *Trafficante* does not stand for the proposition that an action may be filed sixteen months after the alleged discriminatory housing practice occurred. On page 33a of their Appendix, petitioners purportedly printed the text of 42 U.S.C. §3612 (a), but they omitted the very next sentence which reads "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." No Title VIII claim is involved here, for "The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *United States, ex rel. Texas Portland Cement Company v. D.C. McCord*, 233 U.S. 157, 162 (1914).

"Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that . . . statements therein are completely accurate." *Qual-*

ity Molding Company v. American National Fire Insurance Company, 287 F.2d 313, 316 (7th Cir. 1961), *cert. denied* 368 U.S. 826 (1961).

Not only is the concept inapplicable to this litigation, but there was no need for the NCDH to seek out "private attorneys general" and file suit on their behalf, for the Attorney General himself filed an action in the name of the United States against Parma at the same time the NCDH did.

CONCLUSION

In compliance with the Order of the Court remanding this action for further consideration in light of *Warth v. Seldin, supra,* the Court of Appeals correctly decided that it was completely dispositive of the litigation and ordered the complaint dismissed. This decision is consistent with the holding of another panel of that Court, which recognized that judges "have no discretion but . . . to follow all applicable decisions of the Supreme Court." *Mahaley, supra,* 500 F.2d at 1094, footnote 5. Petitioners raise no novel or substantial issues, and have not presented with accuracy any special and important reasons for granting review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Counsel for Respondents

Of Counsel:
ANDREW BOYKO
Solicitor, City of Parma, Ohio